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**IN THE SUPREME COURT OF THE UNITED STATES**

**October Term, 1993**

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THOMAS H. MCNICHOLS, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

_____

*PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT*

_____

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70 pp

## QUESTIONS PRESENTED

1. Whether the Government's imposition of tax and additions to tax, together with a criminal prosecution and forfeiture of all of the Petitioner's assets under the Racketeer Influenced and Corrupt Organizations Act, are sanctions in violation of the Excessive Fines Clause of the Eighth Amendment to the United States Constitution, particularly in light of this Court's recent decision in Austin v. United States, (No. 92-6073, June 28, 1993).

2. Whether the Government's civil tax proceedings against the Petitioner are penal in nature, and separate and distinct from the criminal prosecution and forfeiture proceedings, in violation of the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution.

## LIST OF PARTIES

The parties to the proceedings below were the Petitioner Thomas H. McNichols and the Respondents Commissioner of Internal Revenue.

## TABLE OF CONTENTS


QUESTIONS PRESENTED..... i

LIST OF PARTIES..... ii

TABLE OF AUTHORITIES..... iii

OPINIONS BELOW..... 1

JURISDICTION..... 2

STATEMENT OF THE CASE..... 3

REASONS FOR GRANTING THE WRIT..... 12

I. The First Circuit's Rejection of the Violations of the Excessive Fines Clause of the Eighth Amendment Conflicts with Decisions of this Court and Other Circuits..... 12

II. The First Circuit's Rejection of the Violations of the Double Jeopardy Clause of the Fifth Amendment Conflicts with the Halper Court Decision..... 38

CONCLUSION..... 43

APPENDIX (Opinion and Judgment of U.S. Court of Appeals, U.S. TAX Court Decision and Memorandum)... 1a

## TABLE OF AUTHORITIES

**CASES:**

Austin v. United States, No. 92-6073 (June 28, 1993).9, 12, 15, 22, 23, 24, 32

Harmelin v. Michigan, 111 S. Ct. 2680 (1991).....20, 21, 30

Helvering v. Mitchell, 303 U.S. 391 (1938).....31

Hicks v. Feiock, 108 S.Ct. 1423 (1988).38

Karpa v. C.I.R., 909 F.2d 784 (4th Cir. 1990).....31

Kennedy v. Mendoza-Martinez, 372 U.S. 44 (1963).....18, 19

Kenney v. C.I.R., 111 F.2d 374 (5th Cir. 1940).....31

Morris v. Mathews, 475 U.S. 237, 106 S. Ct. 1032 (1986).....41

Peterson v. Richardson, 370 F. Supp. 1259, 1267 (N.D. Tex. 1973), aff'd, 508 F.2d 45 (5th Cir.), cert. denied, 423 U.S. 830, 96 S. Ct. 50 (1975).....41

Solem v. Helm, 463 U.S. 277 (1983) .....13, 23, 24, 27

Traficant v. C.I.R., 884 F.2d 258 (6th Cir. 1990).....31

United States v. Busher, 817 F.2d 1409 (9th Cir. (1987).....26, 27, 28

United States v. Certain Real Property and Premises Known as 38 Whalers Cove Drive, Babylon, New York, 954 F.2d 29 (2d Cir. 1992).....25, 26

United States ex rel. Marcus v. Hess, 317 U.S. 537, 551, 63 S. Ct. 379, 387 (1943).....39

United States v. Halper, 109 S. Ct. 1892 (1989).....10, 22, 38, 39, 40, 41

United States v. Sarbello, 985 F.2d 716 (3d Cir. 1993).....29, 30

United States v. Ward, 448 U.S. 242, 254 (1980).....22, 23

Wood v. United States, 863 F.2d 417 (5th Cir. 1989).....31

**STATUTES:**

21 U.S.C. § 881.....15, 16, 25

18 U.S.C. § 1963.....16, 17, 26

**OTHER AUTHORITIES:**

Brickey, RICO Forfeiture as "Excessive Fines" or "Cruel and Unusual Punishment", 35 Vill. L. Rev. 905, 923-24 (1990) .....43

Note, Criminal RICO Forfeitures and the Eighth Amendment: "Rough" Justice is not Enough, 14 Hastings Const. L.Q. 451 (1987).....14, 43

Reed & Gill, "RICO Forfeitures, Forfeitable 'Interests', and the Procedural Process", 62 N.C.L. Rev. 57, 59-69 (1983).....15

Smith & Reed, "Civil RICO", ¶¶10.05[2], at 10-25- 10-30 (M. Bender, 1993).....14, 15

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The Petitioner Thomas H. McNichols respectfully prays that a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the First Circuit, entered in the above entitled proceeding on December 29, 1993.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit is reported at 13 F.3d 432 (1st Cir. 1993) and is

reprinted in the Appendix hereto, *infra*, and the opinion of the United States Tax Court is reprinted in the Appendix hereto, *infra*.

## JURISDICTION

On February 23, 1993, the United States Tax Court ordered and determined that there was a deficiency in income tax and interest due from the Petitioner. Pursuant to Rule 13 of the Federal Rules of Appellate Procedure, Petitioner brought an appeal on June 9, 1993 in the United States Court of Appeals for the First Circuit as of right for a review of the Decision and Order of the Tax Court. On Petitioner's appeal, the United States Court of Appeals for the First Circuit on December 29, 1993, entered a judgment and an opinion affirming the Tax Court's decision.

The jurisdiction of this Court to review the judgment of the First Circuit is invoked under 28 U.S.C. § 1254(1).

## STATEMENT OF THE CASE

Petitioner Thomas H. McNichols ("Petitioner") was involved in the importation and sale of marijuana from 1981 to 1982. Also during this time frame, the Petitioner failed to report the taxable income received or expenses incurred in connection with such drug activities on his 1981 and 1982 federal income tax returns and failed to maintain accurate books or records in connection with these activities during the taxable years.

On or about October 15, 1987, the United States Grand Jury, District of Massachusetts, returned a Second Superseding Indictment ("Indictment") naming the Petitioner in thirty-six (36) Counts,

including two (2) Counts for violations of the Racketeering Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1962 and 1963 ("RICO" or "the RICO Statute"). The Indictment set out the properties subject to the forfeiture provisions of the RICO Statute.

On or about June 20, 1988, in the criminal case of United States v. Frederick A. Carroll, et al., (D. Mass. Criminal No. 87-182-N), the Petitioner entered into a plea agreement ("Plea Agreement") with the United States Attorney, whereby he agreed to plead guilty to all of the counts in which he was named in the Indictment and further agreed to forfeit all right, title and interest which he held in any of the properties set out in the Indictment, which were virtually all of his assets.

On October 21, 1988, judgment in this matter was entered against the Petitioner.

Pursuant to such judgment, the Petitioner was sentenced to ten (10) years imprisonment and has served a substantial portion of that sentence. In November 1993, the Petitioner was released from incarceration and is presently on parole.

Also in accordance with his Plea Agreement, the Petitioner forfeited all properties identified in the Indictment to the United States Government, worth approximately $1,200,000.00. The only significant asset owned by the Petitioner and not forfeited to the United States was a residential house in Roslindale, Massachusetts. The Petitioner had inherited this real estate from his father prior to the period of his drug activities.

The Plea Agreement also included a provision which stated, in pertinent part:

> Any monies recovered in this manner shall be held in escrow in an interest-bearing account in the name of the

> Office or by the Clerk of the District Court. Should it be determined by a Court of appropriate jurisdiction (e.g. United States Tax Court), or by agreement between the parties, that Mr. McNichols owes any taxes, interest or penalties to the United States, then the Office agrees that any of the recovered monies held in the above-described escrow account which were once held on behalf of Mr. McNichols will be paid to the Internal Revenue Service in partial satisfaction of any tax debt owed by Mr. McNichols. Should it be determined that Mr. McNichols owes no taxes, interest, or penalties, the recovered monies shall be forfeited to the United States. In that case, Mr. McNichols will provide any assistance requested of him to forfeit the recovered monies to the United States.

Id.

On or about February 16, 1988, the Internal Revenue Service ("IRS") issued a notice of deficiency to the Petitioner assessing deficiencies for income tax and additions to the tax for 1981 and 1982. The underlying Petition in this matter was filed in United States Tax Court ("Tax Court") on May 16, 1988. As of January 26, 1990, the

Petitioner's tax liability totalled over $2,400,000.00, with the interest and penalties assessed continuing to accrue.

On November 1, 1991, the Petitioner filed a Motion for Summary Judgment in the Tax Court arguing, among other things, that the imposition of tax and additions to tax on the property forfeited to the Government was in violation of the Eighth and Fifth Amendments. On February 27, 1992, the Tax Court issued a decision denying the Petitioner's Summary Judgment Motion. On August 10, 1992, in accordance with Rule 122 of the Tax Court Rules, this case was submitted by the parties fully stipulated to the Honorable Theodore Tannenwald, Jr.

On February 23, 1993, the Tax Court ordered and determined that there was a deficiency in income tax due from the Petitioner for 1981 in the amount of $251,228.00; that there was an addition to

tax due from Petitioner for 1981 under Section 6653(b) of the Internal Revenue Code ("the Code" or "IRC") in the amount of $125,614.00; that there was a deficiency in income tax due from the Petitioner for 1982 in the amount of $453,025.00; and that there were additions to tax due from the Petitioner in the amount of $226,513.00 under IRC Section 6653(b)(1), 50% of the interest due on the deficiency under IRC Section 6653(b)(2) and $113,256.00 under IRC Section 6661.

In so holding, the U.S. Tax Court found, with reference to the issues raised on appeal, that:

> 1. the Petitioner had failed to recognize that the various forfeitures to which he had been subjected relate to conviction for crimes separate and distinct from the charge of fraudulent tax evasion; and
>
> 2. the Petitioner's emphasis on the absence of proof by the Respondent of costs for which the additions to tax for fraud are considered reimbursement

> was misplaced in that proof of costs is not a necessary element of the addition to tax.

The Petitioner's tax liability, interest and penalties have continued to accrue and total several million dollars at the present time.

Pursuant to Rule 13 of the Federal Rules of Appellate Procedure, Petitioner brought an appeal on June 9, 1993 in the United States Court of Appeals for the First Circuit as of right for a review of a Decision and Order of the Tax Court.

The First Circuit thereupon addressed the Excessive Fines and Double Jeopardy issues and rejected both the Eighth and Fifth Amendment claims. The Court cited a series of tax cases and also distinguished United States v. Austin, in holding that no violation of the proportionality requirements of the Eighth Amendment had occurred. The Court stated, in pertinent part:

> First there is an insurmountable wall of tax cases ... holding that the government has a right to do precisely what it has done here. Second the instant cases is a civil income tax not a forfeiture case as was Austin. And Austin does not directly or impliedly suggest that either its holding or statements to the effect that a forfeiture can be an excessive fine under the Eighth Amendment are or should be applicable to any actions other than forfeitures under 21 U.S.C.§§ 881(a)(4) and (a)(7).

Furthermore, in dismissing the Fifth Amendment claim, the Court distinguished United States v. Halper. The Court stated:

> We recognize that the language of the [Halper] Court may play an appealing tune to one in petitioner's straits but the case is in apposite. Halper involved a specific statutory penalty. The circumstances giving rise to the double jeopardy violation were unique. To use Halper as a base for vaulting into the tax arena would be to misapply the case and distort its holding.

The final portion of the First Circuit's opinion rejects Petitioner's argument that public policy supports rehabilitation over the pecuniary interests of the IRS.

The Petitioner respectfully prays that a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the First Circuit, entered in the above-entitled proceeding on December 29, 1993.

## REASONS FOR GRANTING THE WRIT

### I.

### THE FIRST CIRCUIT'S REJECTION OF THE VIOLATIONS OF THE EXCESSIVE FINES CLAUSE OF THE EIGHTH AMENDMENT CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS.

### A. THE GOVERNMENT'S CIVIL TAX PROCEEDINGS ARE INTENDED TO BE A FINANCIAL PUNISHMENT AGAINST THE PETITIONER

#### 1. Tax Proceedings, the Criminal Prosecution, and Forfeiture, Are "In Personnem" Sanctions Against Petitioner

In this matter, the Petitioner has been punished for his crimes and been subject to a forfeiture of his illegally gained properties. The Government which has prosecuted him criminally and now seeks to gain more through civil sanctions. The egregious nature of this case argues for a line to be drawn, a line which was suggested by this Court in Austin v. United States, No. 92-6073, 61 U.S.L.W. 4811 (June 28, 1993).

The Eighth Amendment to the Constitution of the United States provides that: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The history of the Eighth Amendment clearly indicates that proportionality, as an underlying premise, applies to Governmental forfeitures. See generally, Solem v. Helm, 463 U.S. at 284, 103 S. Ct. 3006-3007 (1983) ("The principle that a punishment should be proportionate to the crime is deeply-rooted and frequently repeated in common-law jurisprudence."). In accordance with this principle, after a criminal prosecution and forfeiture, the taxes and the additions to tax are sanctions by the Government which are clearly penal in nature and are designed to be additional punishment imposed upon the Petitioner. In this context, this Court should examine carefully the circumstances

under which the extraordinary remedy of an "in personnem" criminal forfeiture is levied together with civil IRS sanctions.

Two types of statutory forfeitures, civil and criminal, are the initial premise upon which an examination must be based. A civil forfeiture determines, in essence, that the property involved in the violation of law is itself "guilty" of such violation and therefore accountable under the law as being forfeited to the Government. Criminal forfeitures, however, are premised on the theory that the property used or acquired in an illicit manner by a criminal defendant should be taken from him as punishment for his acts. Each forfeiture proceeding is prosecuted solely by the Government. See generally, Rough Justice Note, infra, at 456-460; Smith & Reed, "Civil RICO", ¶¶ 10.05[2], at 10-25 - 10-30 (M. Bender, 1993)(hereinafter referred to as "Civil

RICO"), citing, Reed & Gill, "RICO Forfeitures, Forfeitable 'Interests', and the Procedural Process", 62 N.C.L. Rev. 57, 59-69 (1983).

In weighing the punitive impact of the two types of forfeitures, this Court should compare civil "in rem" forfeiture statutes, such as under 21 U.S.C. § 881(a), the drug laws which were examined in Austin, with the criminal forfeiture provisions of Section 1963 under RICO. [1] The First Circuit in its

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[1] Section 881(a), entitled "Subject Property", states, in pertinent part:

> The following shall be subject to forfeiture to the United States and no property right shall exist in them: ...
>
> (4) All conveyances, including aircraft, vehicles, or vessels, which are used, or are intended for use, to transport, or in any manner facilitate the transportation, sale, receipt, possession, or concealment of property described [above] ....
>
> (6) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance, in violation of this title, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this

decision drew technical distinction on this basis which is inconsistent with the intent of this Court as described in Austin.

Section 881(a) of Title 21 clearly focuses the forfeitures within its provisions on the property, or the "rem", which became tainted or "guilty" and therefore subject to forfeiture. In sharp contrast, the Petitioner's forfeiture targeted him personally, in a criminal "in personnem" forfeiture. The Government's Superseding Indictment charged the Petitioner under Section 1963(a)(1)'s

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title, ....

(7) All real property, including any right, title, and interest ... in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this title ....

21 U.S.C. §§ 881(a)(4), (a)(6) & (a)(7).

forfeiture provisions. [2] The criminal forfeiture applies to the Petitioner's real property and personal property, whether tangible or intangible. Id. § 1963(b)(1) & (2). As criminal forfeitures and civil tax liability are both "in personnem", the Government seeks to punish the Petitioner beyond Constitutional limits. [3]

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[2] Section 1963(a)(1) states, in pertinent part, as follows:

> (a) Whoever violates any provision of section 1962 ... shall forfeit to the United States, irrespective of any provision of State law -
>
> (1) any interest the person has acquired or maintained in violation of section 1962; ...

18 U.S.C. § 1963(a)(1).

[3] Compare the Congressional intent evidenced by Section 1963(a), which states, in pertinent part:

> The court, in imposing sentence on such person shall order, in addition to any other sentence imposed pursuant to this section, that the person forfeit to the United States all property described in this subsection. In lieu of a fine otherwise authorized by this section, a defendant who derives profits or other proceeds from an offense may be fined not more than twice the gross profits or other proceeds.

Id. § 1963(a).

**2. The Tax Proceedings are not Remedial in Nature under Objective Criteria as Established by this Court**

This case should be considered by this Court under standards set in Kennedy v. Mendoza-Martinez, 372 U.S. 44 (1963). In Mendoza-Martinez, this Court examined seven (7) factors for a determination of whether an enactment is deemed a punishment. Id. at 168-69. [4] Particularly pertinent to this Court's inquiry is the seventh factor of Mendoza-Martinez, namely, the excessiveness

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[4] These seven factors, considered by the Court are as follows:

> [1] Whether the sanction involves an affirmative disability or restraint, [2] whether it has historically been regarded as punishment, [3] whether it comes into play only on a finding of *scienter*, [4] whether its operation will promote the traditional aims of punishment - retribution and deterrence, [5] whether the behavior to which it applies is already a crime, [6] whether an alternative purpose to which it may rationally be connected is assignable for it, and [7] whether it appears excessive in relation to the alternative purpose assigned[,] are all relevant inquiry....

Id. (footnotes omitted).

of the financial sanction in comparison to available alternatives. Id.

The Court's analysis must focus, per Mendoza-Martinez and Halper, on: a) the nature of the sanction, b) the effect of the criminal prosecution and forfeiture, and c) the effect of the tax liabilities and proceedings in this particular case. Against this backdrop, the Court may then determine whether the sanction solely serves a remedial purpose or if it also serves either the retributive or deterrent purposes of punishment.

In this case, there is no record that the IRS had any interest in the Petitioner before his arrest by the U.S. Attorney's Office. The U.S. Attorney's Office, with the Federal Bureau of Investigation and the Drug Enforcement Agency, investigated, arrested, charged, and ultimately punished the Petitioner with imprisonment. He has

served the term of his incarceration and has lost virtually all of his property in the United States' criminal forfeiture charge. To assert, at this stage and with this procedural background, that the United States is now simply interested in the remedial activity of tax revenue, is attenuated at best. On these facts, it is difficult to conceive of any overriding interest of the federal government besides financial gain, or further punishment by retribution or deterrence. [5] Even the

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[5] Consider the application of the Excessive Fines proportionality test, by Justice Scalia, in Harmelin v. Michigan, 111 S. Ct. 2680, 2693 (1991), who described the unique financial incentive for governmental abuse in forfeiture proceedings, stating:

> There is good reason to be concerned that fines, uniquely of all punishments, will be imposed in a measure out of accord with the penal goals of retribution and deterrence. Imprisonment, corporal punishment and even capital punishment cost a State money; fines are a source of revenue. As we have recognized in the context of other Constitutional provisions, it makes sense to scrutinize governmental action more closely when the State stands to benefit.

recognized remedial goals of making the Government whole for its costs and expenses for pursuing the Petitioner is certainly reduced given the IRS' extremely limited role in the criminal prosecution of the Petitioner and in the brevity of the Tax Court proceedings, which were fully stipulated.

Given the Petitioner's present impoverishment, this action merely acts as a financial albatross around his neck for years to come, which liability cannot even be discharged through personal bankruptcy. Knowing that the Petitioner cannot possibly discharge a multi-million dollar liability and that it can never become "whole" for its expenses, the Respondent clearly seeks only retribution. On this record, the tax

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Id. at 2693 n.9. Given the IRS's history of targeting revenue sources, such analysis applies with even greater weight when a criminal forfeiture is added to IRS tax liens, penalties, and interest.

proceedings in the U.S. Tax Court cannot fairly be characterized as necessarily accomplishing any particularized remedial purpose.

**B. AFTER A CRIMINAL FORFEITURE, THE GOVERNMENT'S TAX AND ADDITIONS TO TAX ARE GROSSLY DISPROPORTIONATE PUNISHMENT UNDER THE EIGHTH AMENDMENT**

**1. This Court's Dicta to the Courts of Appeal to Consider "Excessiveness" Factors under the Eighth Amendment**

In Austin v. United States, this Court examined the application of the Excessive Fines Clause to a civil "in rem" drug forfeiture proceeding and declined a request by the appellant in that action to establish a multi-factor test for "excessiveness" in an Eighth Amendment. [6] In refusing to set

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[6] The Austin Court noted that in Halper, it focused on whether the sanction in the particular case served a punitive objective. United States v. Austin, supra, at 4816 n.14. It stated, that Halper, however, involved a fixed-penalty provision, namely $2,000 per violation, which typically will do little more than make the Government whole. The value of forfeitures, however, "can vary so dramatically that any relationship between the Government's actual costs and the amount of the sanction is merely coincidental. Id., citing, United States v. Ward,

a standard, this Court indicated that it would be "prudent" for the lower courts first have an opportunity to consider the issue. [7]

The Petitioner requested that the First Circuit consider this proposition and establish factors for "excessiveness". While there is limited case law in this area, the Excessive Fines Clause appeared most appropriate for a proportionality analysis of the circumstances of this action.

Although the Solem Court's factors, previously described, are an appropriate starting point for a proportionality

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448 U.S. 242, 254 (1980). The Court indicated further that even "in rem" forfeitures typically serve more than just remedial goals, but also act in the objectives of punishment and deterrence.

[7] In Austin, Justice Scalia suggested that the sole measure of a forfeiture's excessiveness is the relationship between the forfeited property and the offense. The majority noted that this was not the sole factor for the Courts of Appeal to consider. United States v. Austin, supra, at 4816-17 & n.15.

analysis, they seem to be most applicable to criminal prison sentences. [8] As argued by the appellant in Austin, a review of the Courts of Appeals in the Second, Third and Ninth Circuits have examined the Eighth Amendment's application to financial punishments, such as forfeitures and tax penalties.

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[8] In Solem v. Helm, the United States Supreme Court addressed the proportionality requirement of the Eighth Amendment. Solem v. Helm, 463 U.S. 277, 284 (1983)("The principle that a punishment should be proportionate to the crime is deeply rooted and frequently repeated in common-law jurisprudence.").

The Solem Court held as follows:

> a court's proportionality analysis under the Eighth Amendment should be guided by objective criteria, including (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions.

Id. at 292. In determining the gravity of the offense, the Solem Court suggested that the reviewing court consider the harm caused or threatened to the victim of society and noted that "nonviolent crimes are less serious than crimes marked by violence or the threat of violence." Id.

In United States v. Certain Real Property and Premises Known as 38 Whalers Cove Drive, Babylon, New York, 954 F.2d 29 (2d Cir. 1992) (hereinafter cited as "Whalers Cove"), the Second Circuit examined an appeal in which a judgment of forfeiture under 21 U.S.C. § 881(a) deprived the appellant of his residence. The Whalers Cove Court read Halper to apply and stated that "forfeitures that are overwhelmingly disproportionate to the value of the offense must be classified as punishment unless the forfeitures are shown to serve articulated, legitimate civil purposes." Id. at 32-33. It held that,

> Where the seized property is not itself an instrumentality of crime, however, and its total value is overwhelmingly disproportionate to the value of controlled substances involved in the statutory violation, there is a rebuttable presumption that the forfeiture is punitive in nature.

Id. at 36 (emphasis added). [9] In Whalers Cove, since the value of the interest lost to the Government was nearly 300 times the value of the drugs, the Second Circuit found, as a matter of law, "that the forfeiture is overwhelmingly disproportionate compared to the value of the relevant drug transactions, and that therefore a rebuttable presumption that the forfeiture is punitive in nature is created." Id. at 37.

In United States v. Busher, 817 F.2d 1409 (9th Cir. 1987), the Ninth Circuit examined a criminal forfeiture under 18 U.S.C. § 1963, the RICO statute. In its

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[9] The Court noted that

> While we are extremely sympathetic to the need to address our nation's serious narcotics problems, we do not believe that a disproportionately large forfeiture can be reasonably justified as a civil fine as opposed to punishment by placing full responsibility for the "war on drugs" on the shoulders of every individual claimant.

Id. at 37.

analysis, [10] the Court stated, that "the Eighth Amendment, as interpreted in Solem, embodies fluid concepts that vary in application with the circumstances of each case...." Id. at 1415 (citations omitted).

The Court also identified several additional factors to the Solem factors to be considered, including the following: a) the magnitude of the harm caused by the defendant's conduct; b) "the dollar volume of the loss caused"; c) whether physical harm to persons was inflicted, threatened or risked; d) whether the crime had severe collateral consequences, e.g., drug addiction; e) the benefit reaped by the convicted defendant; f) the defendant's

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[10] The Busher Court held that the forfeiture under § 1963(a) of RICO was "clearly punishment as that term is used in the Eighth Amendment." Id. at 1413. It held that where, as here, plaintiff makes a *prima facie* showing that the forfeiture may be excessive, the District Court must make a determination, based upon appropriate findings, that the interest forfeited is not so grossly disproportionate to the offense committed as to violate the Eighth Amendment. Id. at 1415.

state of mind and his motive in committing the crime; and g) the extent to which a RICO enterprise operated by the criminal defendant is infected by criminal conduct.[11] Id.

The Court of Appeals remanded and instructed the District Court to determine whether the forfeiture was so disproportionate to the offense as to violate the Eighth Amendment. Upon such a determination, it stated that the District Court then

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[11] The Busher Court stated:

> The Court should be reluctant to order forfeiture of a defendant's entire interest in an enterprise that is essentially legitimate where he has committed relatively minor RICO violations not central to the conduct of the business and resulting in relatively little illegal gain in proportion to its size and legitimate income. Conversely, if illegal activity accounts for almost all of an enterprise's activity, or almost entirely with ill-gotten funds, it would not normally violate the Eighth Amendment to order forfeiture of all of the defendant's interest in that enterprise.

Id. at 1415-16.

> must limit the forfeiture to such portion of the interest as it deems consistent with these principles; or it may condition the forfeiture upon payment of such sum or relinquishment of such other property as seems just under the circumstances; or it may limit or eliminate other punishment it would otherwise impose so as to bring the total sanction within Constitutional boundaries.

Id. at 1416.

Finally, in United States v. Sarbello, 985 F.2d 716 (3d Cir. 1993), the Third Circuit held that the District Court "may reduce the statutory penalty, a mandatory 100% statutory criminal forfeiture, in order to conform to the Eighth Amendment." Id. at 724-25. The Court further held that the Appellant had established a *prima facie* showing of an Eighth Amendment violation, which justified a remand for "more than a summary finding as to whether the forfeiture provision of the statute as applied to Sarbello's interest in the RICO enterprise is either an unconstitutionally 'cruel and

unusual punishment' or an 'excessive fine'." Id.

The Sarbello Court pointed out that the Solem standard may have been "placed in question" by the Supreme Court's decision in Harmelin v. Michigan. It stated, however, that the "Eighth Amendment requires that a criminal RICO forfeiture order be justly proportioned to the charged offense." Id. at 723-26. In its holding, the Sarbello Court held that "[u]pon a *prima facie* showing of gross disproportionality by the defendant, the Eighth Amendment requires more than a conclusory finding that [a] 100% forfeiture is within constitutional limits." Id. at 725.

The Petitioner requested that the First Circuit consider the above decision for a standard applicable to the instant case. Instead, the First Circuit relied upon one case from this Court's decision in Helvering

v. Mitchell, 303 U.S. 391 (1938) and certain tax cases. Helvering v. Mitchell involved the imposition of a 50% civil penalty to one acquitted on a charge of a wilful attempt to evade taxes. Id. at 401 ("the addition to tax for fraud is imposed 'primarily as a safeguard for the protection of the revenue and to reimburse the government for the heavy expense in the investigation and the loss resulting from the taxpayer's fraud.'"); see also Karpa v. C.I.R., 909 F.2d 784 (4th Cir. 1990); Traficant v. C.I.R., 884 F.2d 258 (6th Cir. 1990); Wood v. United States, 863 F.2d 417 (5th Cir. 1989); Kenney v. C.I.R., 111 F.2d 374 (5th Cir. 1940).

Helvering is inapposite, however, for a number of reasons. First and most importantly, the Petitioner has already forfeited over $1,000,000.00 to the Government to satisfy costs and delinquent

tax payments. Secondly, Petitioner was not acquitted on his criminal charges and has served a substantial prison sentence as punishment for his crime. Petitioner's underlying offense was not related to tax evasion but to drug trafficking. The Excessive Fines Clause of the Eighth Amendment must be implicated in these circumstances.

**2. The First Circuit Refused to Consider Factors Setting Out "Excessiveness" under the Eighth Amendment**

As in Austin, the Petitioner requested that the First Circuit establish factors in applying the Excessive Fines Clause to forfeitures and subsequent civil tax proceedings of a punitive nature. The recommendation of these factors was designed to establish, at a threshold basis, clarity of Eighth Amendment financial determinations by the Court, and predictability of the

application of forfeitures/tax proceedings to defendants. The Court of Appeals, however, rejected this consideration.

The Petitioner contended that the First Circuit establish a *prima facie* or threshold determination that a forfeiture/ tax liability falls within Eighth Amendment considerations if one (1) of the following two (2) conditions are met:

> 1) if the value of the forfeiture/tax liability is excessive as compared to the criminal behavior involved of the owner; or
>
> 2) if the value of the forfeiture/tax liability is excessive as compared to the financial condition of the owner.

Second, the Petitioner argued that upon a *prima facie* finding of excessiveness, the Government is to have the burden of demonstrating that the aggregate of the forfeiture/tax liability was not "grossly disproportionate" so as to violate the Excessive Fines Clause.

In considering the "grossly disproportionate" standard on financial punishments, the Petitioner respectfully suggested to the First Circuit that the following test be applied: A) the extent of the Government's investigation, prosecution, and aggregate cost and resource allocation; and B) the defendant's relevant property and financial information. The Petitioner noted that Court of Appeals should determine that it is *per se* grossly disproportionate under the Excessive Fines Clause of the Eighth Amendment if the aggregate of assets seized and/or liability incurred exceeds 100% of the defendant's assets.

In every respect, the First Circuit rejected the Petitioner's contention and failed to consider the guidelines on forfeitures set by the other Courts of Appeal.

### 3. The Government has Exceeded Proportionality Requirements of the Eighth Amendment by its Forfeiture + Tax Proceedings

The Petitioner respectfully suggests that the instant case meets the threshold inquiry and is *prima facie* "grossly disproportionate" under the Eighth Amendment. Furthermore, under a proposed 100% disproportionality test, the instant case is *per se* "excessive".

In reviewing the proportionality of the sanctions at issue herein, the Petitioner respectfully submits that this Court should initially consider the extent of the property subject to the criminal forfeiture. The Government has already seized assets from the Petitioner of over $1,200,000.00 of personal and real property, a listing of which is identified in the Indictment. Furthermore, since this forfeiture is "in personnem", its impact is not closed. The

Government conceivably could seek other assets, if such even existed, and attempt to trace them to the Petitioner's illicit activities. The forfeiture has eliminated virtually all of the Petitioner's property, leaving him and his family with little to start their lives over with after the end of his incarceration.

But, instead of having a "zero net worth", the Government has imposed a tax, along with interest, fines and penalties, totalling well over several millions of dollars. The Petitioner cannot discharge this liability in bankruptcy. He must carry it with him for at least ten (10) years, whether it is collectible or not. It is currently being levied on the only property which has not been forfeited to the Government, the house which he inherited from his father. Although the Petitioner does not dispute the serious nature of his

crime, he submits that such a multi-million dollar penalty is disproportionate.

Public policy argues against the impoverishment of criminal defendants, and the Government must not apply, on an inconsistent basis, criminal and monetary sanctions against its citizens. The Petitioner's ability to eliminate such debt is essentially nonexistent and he thus becomes virtually foreclosed from ever reentering society as a productive member. Unquestionably, public policy argues on behalf of the Petitioner and against the Government's levying of an additional sanction in this case.

## II.

## THE FIRST CIRCUIT'S REJECTION OF THE VIOLATIONS OF THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT CONFLICTS WITH THE HALPER COURT DECISION.

The Petitioner contends that the Supreme Court's language in United States v. Halper, 109 S. Ct. 1892 (1989) is on point to the instant facts. In Halper, this Court noted that the labels "criminal" and "civil" are not of critical importance. Id. at 1901; see Hicks v. Feiock, 108 S. Ct. 1423 (1988) ("the labels affixed either to the proceeding or to the relief imposed ... are not controlling and will not be allowed to defeat the applicable protections of federal constitutional law"). Thus, it stated that the "determination of whether a given civil sanction constitutes punishment in the relevant sense requires a particularized assessment of the penalty imposed and the purposes that the penalty may fairly be said

to serve." Id. at 1901 & n.7 (The Court notes that the determination of whether a sanction constitutes punishment is not from the defendant's perspective, citing, United States ex rel. Marcus v. Hess, 317 U.S. 537, 551, 63 S. Ct. 379, 387 (1943)).

As the Halper Court noted, subsequent civil proceedings constitute punishment when the civil sanction, as applied in a particular case, serves the goal or objective of punishing a defendant. Id. at 1902. Justice Blackmun, writing for the majority, went on to state:

> These goals are familiar. We have recognized in other contexts that punishment serves the twin aims of retribution and deterrence.... Furthermore, '[r]etribution and deterrence are not legitimate nonpunitive governmental objectives' .... From these premises, it follows that a civil sanction that cannot fairly be said to solely to serve a remedial purpose, but rather can be explained only as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term....

Id. The Court went on to hold that under the Double Jeopardy Clause, a defendant who had already been punished in a criminal prosecution may not be subjected to an additional civil sanction, which was designed as retribution or as a deterrent. Id.

The Halper Court held that an element of "rough justice" may be achieved when a sanction is fixed compensates the United States for its costs. Id. at 1902. As Justice Blackmun noted,

> [w]here a defendant previously has sustained a criminal penalty and the civil penalty sought bears no rational relation to the goal of compensating the Government for its loss, but rather appears to qualify as 'punishment' in the plain meaning of the word, then the defendant is entitled to damages and costs to determine if the penalty sought in fact constitutes a second punishment. We must leave to the trial court the discretion to determine on the basis of such an accounting, the size of the civil sanction the Government may receive without crossing the line between remedy and punishment.

Id.; cf. Morris v. Mathews, 475 U.S. 237, 106 S. Ct. 1032 (1986); Peterson v. Richardson, 370 F. Supp. 1259, 1267 (N.D. Tex. 1973), aff'd, 508 F.2d 45 (5th Cir.), cert. denied, 423 U.S. 830, 96 S. Ct. 50 (1975).

Without specifically citing to the Eighth Amendment in its holding, the Halper Court found "tremendous disparity" between the Government's actual costs and the civil penalty imposed. Id. at 1903. It indicated that a defendant is protected from a civil sanction which is "so disproportionate" to the damages caused." Id.

Such circumstances as present in the Halper case are directly on point in this action. With a limited exception, the Petitioner has previously forfeited all of his property, real or personal. He is currently seeking to protect his only remaining asset, the home inherited from his

father. The Petitioner has been subject to a rigorous tax proceeding by the Government, which is based completely on the same conduct. Knowing the Petitioner's impoverishment, the Government's policy objective can only be considered as retribution and further punishment. Given that the Petitioner has recently left prison and is seeking to rejoin society, the United States seeks to impose a burdensome tax liability which will effectively force him and his family into poverty for several years. The Government's objective of placing a multi-million dollar liability upon the Petitioner, while having no likelihood of collecting upon it, is constitutionally impermissible.

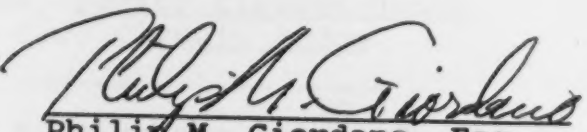
This Court can do no less for the Petitioner in the matter before it. See generally, Brickey, RICO Forfeiture as "Excessive Fines" or "Cruel and Unusual Punishment", 35

Vill. L. Rev. 905, 923-24 (1990); Note, Criminal RICO Forfeitures and the Eighth Amendment: "Rough" Justice is not Enough, 14 Hastings Const. L.Q. 451 (1987).

## CONCLUSION

The Petitioner Thomas H. McNichols respectfully prays that a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the First Circuit.

Respectfully submitted,
Petitioner-Appellant,
Thomas H. McNichols

By: 

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Dated: March 25, 1994

**UNITED STATES COURT OF APPEALS**

**For the First Circuit**

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No. 93-1622

THOMAS H. McNICHOLS,

Petitioner, Appellant,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent, Appellee.

---

APPEAL FROM THE UNITED STATES TAX COURT

[Hon. Theodore Tannenwald, Jr., Tax Court Judge]

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Before

Selya, Circuit Judge,
Bownes, Senior Circuit Judge,
Cyr, Circuit Judge.

---

Philip M. Giordano, with whom Linda L. Trent, and Ricklefs & Giordano were on brief for petitioner.

Francis M. Allegro, Counselor to the Assistant Attorney General, with whom Michael L. Paup, Acting Assistant Attorney General, Gary R. Allen, Kenneth L. Greene, and Alice L. Ronk, Attorneys, Tax Division, Department of Justice, were on brief for respondent.

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December 29, 1993

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**BOWNES, Senior Circuit Judge.** This is an appeal from a decision of the tax court holding the petitioner civilly liable for deficiencies in income tax for the years 1981 and 1982. The tax court also found petitioner liable for additions to the tax due. The amounts are substantial, but the computations are not contested. The tax court brushed aside petitioner's main defense, that imposition of the deficiencies and additions to tax violates the proscription against excessive fines of the Eighth Amendment and violates the Double Jeopardy protection against multiple punishments under the Fifth Amendment. That contention is the main issue before us.

I.

Petitioner is a convicted drug dealer. In October 1987 petitioner was indicted along with Frederick A. Carroll on a number

of criminal charges: distribution of and conspiracy to distribute marijuana; violations of the Racketeering Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 162 and 163; conspiracy to defraud the United States; and subscribing to false tax returns.

In February of 1988 the Internal Revenue Service sent a notice of deficiency to petitioner assessing deficiencies in income and additions to tax for the years 1981 and 1982. The interest on the tax and additions thereto continue to accrue. As of January 26, 1990, petitioner's tax liability totalled $2,422.963.94.

On June 20, 1988, petitioner entered into a plea agreement with the United States Attorney whereby he agreed to plead guilty to all the counts in the indictment in which he was named. He also agreed to forfeit all right, title and interest in the properties

described in the indictment. Petitioner claims that the value of the forfeited property is "approximately $1,200,000." (Brief at 3.) The pertinent provisions of the plea agreement provide:

> 7. Mr. McNichols agrees to relinquish all right, title or interest in any monies held in any foreign bank accounts (or those located in St. thomas, United States Virgin Islands) held in his name or on his behalf, or on behalf of any entity as to which he is the true beneficiary. (The monies so held on behalf of Mr. McNichols and Thomas H. McNichols are believed to be in excess of $600,000.00). Mr. McNichols further agrees promptly to take all steps necessary to place any of the above-described monies within the custody and control of the United States. Mr. McNichols also agrees to hold harmless any person, corporation or bank which assists the United States in recovery such monies.
>
> Any monies recovered in this manner shall be held in escrow in an interest-bearing account in the name of the Office or by the Clerk of the District Court. Should it be determined by a court of appropriate jurisdiction (e.g. United States Tax Court), or by agreement between the parties, that Mr. McNichols owes any taxes, interest or penalties to the United States, then the Office agrees that any of the recovered monies held in the above-described escrow account which were once held on behalf of

Mr. McNichols will be paid to the Internal Revenue Service in partial satisfaction of any tax debt owed by Mr. McNichols. Should it be determined that Mr. McNicols owes no taxes, interest, or penalties, the recovered monies shall be forfeited to the United States. In that case, Mr. McNichols will provide any assistance requested of him to forfeit the recovered monies to the United States.

8. The United States Attorney's Office makes no promises with respect to any civil tax liability incurred by Mr. McNichols (with the exception of the promise made in paragraph 7 above). To the extent permitted under all applicable laws and regulations, the United States Attorney's Office will recommend that the Internal Revenue Service not seek to satisfy [sic] any tax assessment by levying and forfeiting the house and real property at 12 Edgemont Street, Boston, Massachusetts. The United States does not in any way represent that it can prevent the Internal Revenue Service from levying on the above-described property.

On October 21, a judgment of conviction was entered. Pursuant to that judgment petitioner was sentenced to ten years incarceration and is now serving that sentence.

The case before the tax court was submitted fully stipulated along with joint

exhibits. Taxpayer conceded: that "[d]uring the taxable years 1981 and 1982, [he] derived taxable income and incurred costs from the importation and sale of marijuana"; that he "did not report any of the taxable income received or costs incurred from the sale of marijuana . . . on his federal income tax returns for [the 1981 and 1982] taxable years"; and that "[i]n connection with [his] illegal drug activities [he] did not maintain and, therefore, could not submit complete and accurate books and records of his income producing activities for the taxable years 1981 and 1982 as required by the applicable provisions of the Internal Revenue Code and the regulations promulgated thereunder." In addition, the taxpayer agreed that he had "fraudulently, and with intent to evade tax omitted taxable income from his federal tax returns for the taxable income from his

federal tax returns for the taxable years 1981 and 1982," and that "[a] part of the underpayments of tax which was required to be shown in his federal income tax returns for the taxable years 1981 and 1982 was due to fraud." Taxpayer also stipulated that he had purchased two shell companies, opened various bank accounts in behalf of these companies, and had "deposited, or caused to be deposited" over $1,720,565 into these companies' bank accounts during 1981 and 1982.

Based on the stipulated facts the tax court found the petitioner liable for tax deficiencies and additions thereto for the years 1981 and 1982 in the total amount of $1,169,699.00. This appeal followed. We affirm.

II.

Petitioner contends that the imposition by the IRS of the tax deficiencies and

additions thereto on property already forfeited to the government constitutes an excessive fine under the Eighth Amendment and double jeopardy under the Fifth Amendment.

Although it could be argued that under the plea agreement petitioner agreed to accept the assessment of income taxes due we will do, as the parties have done, and address the merits of petitioner's appeal. Petitioner relies primarily on two recent Supreme Court cases, Austin v. United States, _____ U.S._____, 113 S. Ct. 2801 (1993) and United States v. Halper, 490 U.S. 435 (1989).

Austin was a forfeiture case. Austin was indicted and subsequently pleaded guilty in a South Dakota state court to one count of possessing cocaine and was sentenced to seven years imprisonment. Shortly after he pled guilty the United States filed a

forfeiture action under 21 U.S.C. §§881(a)(4) and (a)(7) in the United States District Court for South Dakota seeking forfeiture of Austin's mobile home and auto body shop. Austin, 113 S. Ct. at 2803. The Court found that the Excessive Fines Clause of the Eighth Amendment was not limited to criminal actions. It phrased the issue as follows: "the question is not, as the United States would have it, whether forfeiture under §§881 (a)(4) and (a)(7) is civil or criminal, but rather whether it is punishment." Id. at 2806. The Court found that historically forfeiture was viewed as punishment. It then found that because Congress "has chosen to tie forfeiture directly to the commission of drug offenses" the forfeiture statutes were punitive in nature, and were "subject to the limitations of the Eighth Amendment's Excessive Fines Clause." Id. at 2812. The Court refused

to establish a multifactor test for determining whether a forfeiture is constitutionally excessive, but left that for the lower courts to work out in the first instance. Id.

Using Austin as a springboard, petitioner argues that the additions to the income tax were punitive, and that, by seizing his property and then subjecting that same property to an income tax along with penalties and interest, the IRS has violated the proportionality requirements of the Eighth Amendment. We decline to take the giant leap that petitioner urges for several reasons. First there is an insurmountable wall of tax cases, discussed infra, holding that the government has a right to do precisely what it has done here. Second, the instant case is a civil income tax not a forfeiture case as was Austin. And Austin does not directly or impliedly

suggest that either its holding or statements to the effect that a forfeiture can be an excessive fine under the Eighth Amendment are or should be applicable to any actions other than forfeitures under 21 U.S.C. §§881(a)(4) and (a)(7). Nor, under the facts of this case, do we perceive any reason for applying the principles of Austin to petitioner. Petitioner agreed to the forfeiture. He stipulated to the tax court that he derived unreported taxable income in 1981 and 9182 from the sale of marijuana. The plea agreement warned petitioner that income tax might be due. Indeed, prior to signing the plea agreement, petitioner was sent a notice of deficiency assessing taxes and penalties for the years 1981 and 1982. The Supreme Court in James v. United States, 366 U.S. 213 (1961) made an observation that applies to petitioner:

We should not continue to confound confusion, particularly when the result would be perpetuate the injustice of relieving embezzlers of the duty of paying income taxes on the money they enrich themselves with through theft while honest people pay their taxes on every conceivable type of income.

Id. at 221. We find no Eighth Amendment violations.

Petitioner's claim that the tax assessment, including penalties, violates the Fifth Amendment proscription against multiple punishments is based on United States v. Halper. In Halper, defendant was the manager of a company which provided medical services for patients eligible for medicare benefits. He submitted sixty-five separate false claims for services rendered to Blue Cross and Blue Shield of New York City. Blue Cross overpaid Halper's company a total of $585 and passed the overcharges along to the federal government. Halper was indicated on sixty-five counts of violating the False Claims Act, 18 U.S.C. §287. He

was convicted on all sixty-five counts as well as on sixteen counts of mail fraud. He was sentenced to imprisonment for two years and fined $5,000.

The government then sued Halper under the civil False Claims Act. Halper's criminal conviction was, of course, sufficient to ground civil liability. Under the provisions of the statute, Halper was subject to a penalty of more than $130,000. The district court refused to assess such a penalty, holding that to do so would result in punishment barred by the double jeopardy clause. The Supreme Court affirmed. The Court pointed out that the double jeopardy protection was "intrinsically personal."

> Its violation can be identified only by assessing the character of the actual sanctions imposed on the individual by the machinery of the state.
>
> In making this assessment, the labels "criminal" and "civil" are not of paramount importance. It is commonly understood that civil proceedings may advance punitive as well as remedial goals, and, conversely,

that both punitive and remedial goals may be served by criminal penalties.

United States v. Halper, 490 U.S. at 447.

The Court went on to say:

> To that end, the determination whether a given civil sanction constitutes punishment in the relevant sense requires a particularized assessment of the penalty imposed and the purposes that the penalty may fairly be said to serve. Simply put, a civil as well as a criminal sanction constitutes punishment when the sanction as applied in the individual case serves the goals of punishment.

Id. at 448.

We recognize that the language of the Court may play an appealing tune to one in petitioner's straits but the case is inapposite. Halper involved a specific statutory penalty. The circumstances giving rise to the double jeopardy violation were unique. To use Halper as a base for vaulting into the tax arena would be to misapply the case and distort its holding. We hold that there was no double jeopardy violation.

Petitioner has also cited to bits and pieces of a number of other cases in an effort to bolster his arguments. We have examined them all and find they do not advance his claims by even one step.

III.

We now outline the wall of cases that bars the way to any defense by petitioner to the judgment of the Tax Court. Helvering v. Mitchell, 303 U.S. 391 (1938), is the foundation stone for the wall. The Court held that an acquittal on the criminal charge of a wilful attempt to evade taxes does not bar assessment and collection of the 50% civil penalty. The Court rejected defendant's contention that the 50% addition to the tax was not a tax but a criminal penalty intended as punishment. Id. at 399-400. It held that the 50% addition was remedial:

The remedial character of sanctions imposing additions to a tax has been made clear by this Court in passing upon similar legislation. They are provided primarily as a safeguard for the protection of the revenue and to reimburse the Government for the heavy expenses of investigation and the loss resulting from the taxpayer's fraud.

Id. at 401. (Footnote omitted.)

In James v. United States, the Court stated:

When a taxpayer acquires earnings, lawfully or unlawfully, without the consensual recognition, express or implied, of an obligation to repay and without restriction as to their disposition, "he has received income which he is required to return, even though it may still be claimed that he is not entitled to retain the money, and even though he may still be adjudged liable to restore its equivalent." North American Oil v. Brunet, supra, at p. 424.

366 U.S. at 219. Further, the court noted that Congress did not intend to treat a law-breaking taxpayer differently from a law-abiding one. Id. at 220.

There are also some significant circuit court cases. In Karpa v. C.I.R., 90 F.2d 784 (4th Cir. 1990), the Fourth Circuit held that the retroactive imposition of a tax

penalty for substantial understatement of tax liability did not violate the ex post facto clause of the Constitution. After discussing Halper, the court ruled that the increased tax penalty was a civil sanction and therefore the ex post facto prohibition was not implicated. Karpa, 909 F.2d at 788.

In Traficant v. C.I.R., 884 F.2d 258 (6th Cir. 1989), the petitioner argued that his prior acquittal on criminal charges of bribery precluded the tax court from finding that he took bribes. Relying heavily on Helvering, the Sixth Circuit upheld the tax court's ruling that neither issue preclusion nor double jeopardy foreclosed such a finding because the tax case was a civil proceeding and the burden of proof different that the one required in a criminal case.

Wood v. United States, 863 F.2d 417 (5th Cir. 1989), is very similar to the case at bar. As here, the IRS had imposed a tax

on proceeds that had been forfeited to the government. Wood argued that this was "fundamentally unfair." In words that are directly applicable here, the court rejected Wood's claim:

> There is no dispute that Wood exercised complete dominion and control over the proceeds from the drug smuggling. It does not matter that by operation of law all right and title vested in the government as soon as the money was earned.
>
> . . .
>
> The legal test for taxable income is dominion and control, and that test in its terms excludes consideration of what happens to income after it flows from the taxpayer's hands.

Id. at 419.

Our final case is Kenney v. C.I.R., 111 F.2d 374 (5th Cir. 1940). Its holding speaks for itself:

> The imposition of civil fraud penalties is not prohibited by the Fifth Amendment to the Constitution by reason of the petitioner's having previously plead guilty to such indictment, because the penalty imposed by Section 293(b) is a civil and not

a criminal penalty. Helvering v. Mitchell, 303 U.S. 391, 58 S.Ct. 630, 82 L.Ed. 917.

Id. at 375-76.

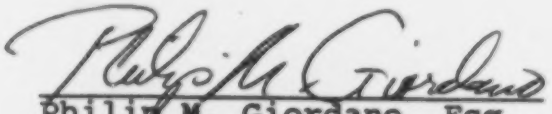
IV.

As a final issue, petitioner argues that the public policy that supports rehabilitation outweighs the pecuniary interest of the IRS. It is difficult to understand that this means and how it is relevant. We can only conjecture that petitioner suggests that if he does not have to pay income tax and additions thereto on his ill-gotten gains, he will be better prepared to again live in the style that his drug dealing made possible after he finishes his prison term. This is somewhat akin to the defendant who had killed both his parents asking mercy from the court because he was an orphan.

**The judgment of the Tax Court is affirmed. Costs awarded to appellee.**

## CERTIFICATE OF SERVICE

I, Philip M. Giordano, Esq., attorney for the Petitioner-Appellant, Thomas H. McNichols, do hereby certify that on this 25th day of March, 1994, I caused to be served Petitioner Thomas H. McNichols' Petition For a Writ of Certiorari to the United States Court of Appeals for the First Circuit, by causing to be delivered, one (1) true copy of same, by first class mail, postage prepaid, to Gary Allen, Esquire, and Alice Ronk, Esquire, United States Department of Justice, Tax Division, P.O. Box 502, Washington, D.C. 20044.



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Supreme Court, U.S.
FILED

931540 MAR 28 1994

OFFICE OF THE CLERK

NO. _____

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**IN THE SUPREME COURT OF THE UNITED STATES**

**October Term, 1993**

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THOMAS H. MCNICHOLS, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

---

*PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT*

---

APPENDIX

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83 pp

# *APPENDIX*

**UNITED STATES TAX COURT**

**THOMAS H. McNICHOLS,**
**Petitioner**
**v.**
**COMMISSIONER OF INTERNAL REVENUE,**
**Respondent**

**Docket No. 10412-88.**

DECISION

Pursuant to the determination of this Court as set forth in its Memorandum Opinion filed February 23, 1993, it is

ORDERED and DECIDED: That there is a deficiency in income tax due from petitioner for 1981 in the amount of $251,228;

That there is an addition to tax due from petitioner for 1981 under section 6653(b) of the Internal Revenue Code in the amount of $125,614; and

That there is a deficiency in income tax and additions to tax due from petitioner for 1982 as follows:

| Deficiency | Sec. 6653(b)(1) I.R.C. |
|---|---|
| $453,025 | $226,513 |

| Sec. 6653(b)(2) I.R.C. | Sec. 6661 I.R.C. |
|---|---|
| 50% of the interest due on deficiency | $113,256 |

Theodore Tannenwald, Jr.
Judge
**Entered February 23, 1993**

UNITED STATES TAX COURT

THOMAS H. McNICHOLS,
Petitioner
v.
COMMISSIONER OF INTERNAL REVENUE,
Respondent

Docket No. 10412-88.
Filed February 23, 1993.

Philip M. Giordano and Arnold N. Pollinger, for petitioner.

Maureen T. O'Brien and Louise R. Forbes, for respondent.

MEMORANDUM OPINION

TANNENWALD, Judge: Respondent determined deficiencies in, and additions to, petitioner's Federal income taxes for 1981 and 1982 as follows:

Additions to Tax

| Year | Deficiency | Sec. 6653(b) |
|---|---|---|
| 1981 | $251,228 | $125,614 |

| Year | Deficiency | Sec. 6653(b)(1) |
|---|---|---|
| 1982 | $453,025 | $226,513 |

| Sec. 6653(b)(2) | Sec. 6661 |
|---|---|
| 50% of the interest due on the deficiency | $113,256 |

The issues for decision are whether petitioner: (1) Had unreported taxable income for 1981 and 1982 in the amounts of $503,500 and $906,065 respectively; (2) is liable for the additions to tax for fraud under section 6653 (b)[1]; and (3) is liable for the addition to tax under section 6661 for the taxable year 1982.

---

[1] Unless otherwise indicated, all statutory references are to the Internal Revenue Code in effect for the years at issue, and all Rule references are to the Tax Court Rules of Practice and Procedure.

This case was submitted fully stipulated pursuant to Rule 122(a). All the stipulated facts are found accordingly. The attached exhibits are incorporated by reference.

Petitioner resided in Boston, Massachusetts, at the time the petition in this case was filed. He filed Federal income tax returns for 1981 and 1982 on the cash basis with the Internal Revenue Service Center, Andover, Massachusetts.

Petitioner was engaged in the importation and sale of marijuana during 1981 and 1982. In connection with such activities, on or about May 25, 1982, petitioner purchased an offshore shell company by the name of Travistock Trading Co., Ltd. (Travistock). A second offshore shell company, Tyler Holding, Ltd. (Tyler), was purchased on or about October 9, 1981. Travistock and Tyler were utilized by

petitioner to conceal assets and revenues related to petitioner's illegal drug activities from the knowledge of the U.S. authorities, including the Internal Revenue Service.

During 1981 and 1982, petitioner deposited, or caused to be deposited, the following amounts of money into bank accounts of Travistock and Tyler:

| Year | Travistock | Tyler | Total |
|---|---|---|---|
| 1981 | $311,000 | $192,500 | $503,500 |
| 1982 | 39,650 | 866,415 | 906,065 |

Petitioner has stipulated that such amounts constituted income from his illegal drug activities.

For the most part, Travistock and Tyler invested the money in certificates of deposit (CD's) issued by various banks. The CD's, most of which were renewed on one or more occasions, matured during 1981, 1982, and 1983. The precise manner in which such

monies ultimately were expended is unclear; it appears, however, that petitioner used the majority of such funds to purchase real property for investment, including a one-third interest in 30 acres on Martha's Vineyard, a one-half interest in three parcels of property on St. Thomas, U.S. Virgin Islands, and two condominiums in Boston, Massachusetts.

Petitioner failed to report as taxable income any portion of the drug revenues deposited into bank accounts of Travistock and Tyler during the 1981 and 1982 taxable years. Likewise, petitioner failed to claim as deductions any expenses incurred in producing such income including costs of drugs sold. In this connection, petitioner did not maintain accurate books or records in respect of his drug-related activities during the taxable years at issue.

In October 1988, petitioner pleaded guilty to a variety of criminal charges relating to the distribution of marijuana, racketeering, criminal enterprise, conspiracy to defraud the United States, and subscribing to false tax returns. As a result, petitioner was sentenced to 10 years imprisonment and is now serving that sentence. Pursuant to a plea agreement entered into between petitioner and the U.S. Attorney for the District of Massachusetts in a related criminal case, petitioner also forfeited substantial amounts of money and properties.

Initially, petitioner contends that the burden of proof is on respondent to establish that petitioner's unreported income, namely, the deposits into Travistock and Tyler during 1981 and 1982, was net of deductible expenses, including costs of the drugs sold. According to petitioner,

"Respondent in its answer, * * * for the first time, * * * implies that Petitioner had no expenses paid from Travistock and Tyler, and that such stipulated deposits to the Petitioner were net of expenses from Travistock and Tyler." Petitioner therefore claims that respondent raised a new matter with respect to which respondent bears the burden of proof. We disagree.

In the answer, respondent simply denied error in not determining itemized deductions, credits, or offsets against the unreported income of petitioner for 1981 and 1982, as the petition alleged. Respondent's position in no way establishes a new matter which would shift the burden of proof to respondent under Rule 142(a) with respect to whether the amounts determined as income were net of expenses, insofar as the underlying deficiencies are concerned. That burden requires petitioner to show that the

amounts determined for income in the notice of deficiency were not includable in income (petitioner has conceded that they were) or that they were offset by allowable deductions. Welch v. Helvering, 290 U.S. 111 (1933); Flint v. Commissioner, T.C. Memo. 1991-405 (costs of goods sold). Petitioner's attempt to transform his deductions, credits, or offsets in his "new matter" argument into a further position that respondent has the burden of proving that the determinations of income in the notice of deficiency were not arbitrary and capricious is equally without merit.

Recognizing that "the burden of proof may fall on petitioner", petitioner alternatively contends that he has met his burden of proof in respect of the deductibility of various expenditures by Travistock and Tyler in 1981 and 1982 totaling approximately $7,200. According to

petitioner, such expenditures were incurred, and paid, in the ordinary course of his drug business and, as such, are deductible under section 162. Petitioner therefore asserts that the failure to allow these expenditures is a further ground for concluding that respondent's deficiency determinations were arbitrary and capricious. Again, we disagree.

There is no indication that such expenditures were related to petitioner's importation and/or sale of marijuana; rather, the record indicates that they apparently were incurred for purposes of concealing revenues generated from petitioner's drug business and investing such revenues in CD's. In essence, such expenditures were at best expenses of Travistock and Tyler. As such there is no basis for allowing them as deductions to petitioner. Travistock and Tyler were

created as separate entities by petitioner, and their separateness has not been disputed by respondent.[2] The record herein is utterly devoid of any evidence which would permit us to accept petitioner's argument that Travistock and Tyler were his alter egos and therefore fall within the narrow exception to the doctrine established by Moline Properties v. Commissioner, 319 U.S. 436 (1943). See First Chicago Corp. v. Commissioner, 96 T.C. 421, 444 et seq. (1991). In this connection, we note that the fact that the instant case is fully stipulated does not lessen either party's burden of proof. Borchers v. Commissioner, 95 T.C. 82, 91 (1990), affd. 943 F.2d 22 (8th Cir. 1991).

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[2] We note that the deficiency notice does not include any interest from CD's in petitioner's income.

With respect to the additions to tax for fraud under section 6653(b),[3] we must determine whether respondent's burden of proof has been satisfied. That burden requires respondent to establish that there

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[3] For the 1981 taxable year, sec. 6653(b) provided in part:

> (b) Fraud.--If any part of any underpayment (as defined in subsection (c)) of tax required to be shown on a return is due to fraud, there shall be added to the tax an amount equal to 50 percent of the underpayment. * * *

For the 1982 taxable year, sec. 6653 (b) became sec. 6653(b) (1) and (2), with sec. 6653 (b) (1) retaining language identical to that of prior sec. 6653 (b). New sec. 6653 (b) (2) provided in part:

> (2) Additional amount for portion attributable to fraud.-- There shall be added to the tax (in addition to the amount determined under paragraph (1)) an amount equal to 50 percent of the interest payable under section 6601--
>
> (A) with respect to the portion of the underpayment described in paragraph (1) which is attributable to fraud, * * *

has been an underpayment, that some part of the underpayment was due to fraud (sections 6653(b) and 6653(b)(1)), and the portion of the underpayment due to fraud (section 6653(b)(2)). See DiLeo v. Commissioner, 96 T.C. 858, 873 (1991), affd. 959 F.2d 16 (2d Cir. 1992).

With respect to the 50-percent addition to tax, the answer is clearly in the affirmative since petitioner has stipulated: (a) He failed to report income in the amounts set forth in the notice of deficiency; (b) He "fraudulently, and with intent to evade tax omitted taxable income from his Federal income tax returns for the taxable years 1981 and 1982", and (c) "a part of the underpayment of tax which was required to be shown on petitioner's Federal income tax returns for the taxable years 1981 and 1982 was due to fraud". Under these circumstances, we need not, for the

purposes of the 50-percent addition to tax, examine the question of respondent's burden of proof in respect of the existence of deductions, credits, etc. Cf. United States v. Bender, 218 F.2d 869, 871-872 (7th Cir. 1955); Rivera v. Commissioner, T.C. Memo. 1979-343, and cases cited therein. Accordingly, such addition to tax attaches to the entire deficiency.

With respect to the addition to tax imposed by section 6653(b) (2), the question is the extent to respondent's burden of proof as to "the portion of the underpayment * * * which is attributable to fraud" when, as is the case herein, the taxpayer claims that there are offsetting deductions. In the cases dealing with the obligation of respondent to negate such deductions and credits in respect to the addition to tax under section 6653(b) (1), it is clear that if respondent establishes that the taxpayer

had unreported income, such addition to tax attaches to the amount of such income unless the taxpayer comes forward with evidence as to the claimed deductions, in which event the burden of proof to disprove such deductions rests with respondent. Compare United States v. Bender, supra, and the cases cited in Rivera v. Commissioner, 264 F. 2d 400, 404-405 (4th Cir. 1959), modifying T.C. Memo. 1957-122, and Perez v. Commissioner, T.C. Memo. 1974-211 (there was some evidence). We think the reasoning which underpins this position, namely the difficulty of the Government to show a negative, also applies to the addition to tax under section 6653(b) (2). Given petitioner's stipulation that he had income from illegal drug activities in the amounts set forth in the deficiency notice, that he had unreported taxable income and that a part of the underpayments was due to fraud,

coupled with his failure to offer any evidence of deductions (including cost of goods sold) to which he may have been entitled, we think that, under the principles enunciated in United States v. Bender, supra,[4] respondent's burden of proof has been satisfied. Accordingly, we hold that the addition to tax under section 6653(b) (2) applies to the entire underpayment as determined in the notice of deficiency.

We now turn to petitioner's contention that the imposition of the deficiencies and additions to tax, including the additions to tax for fraud, in respect of income which has been forfeited to the Government, constitutes double jeopardy under the Fifth Amendment and an excessive fine under the

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[4] See also Fifer v. Commissioner, T.C. Memo. 1993-44.

Eighth Amendment.[5] We considered petitioner's constitutional arguments in McNichols v. Commissioner, T.C. Memo. 1992-120, and concluded that the instant case was controlled by Ianniello v. Commissioner, 98 T.C. 165 (1992), wherein this Court held that such imposition of taxes, and additions to taxes, did not violate the taxpayers' constitutional rights.

Petitioner fails to recognize that the various forfeitures to which he has been subjected relate to conviction for crimes separate and distinct from the charge of fraudulent tax evasion under section

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[5] Petitioner also contends for the first time in his opening brief that the imposition of taxes and additions to taxes on income forfeited to the Federal Government violates the Due Process and Equal Protection Clauses of the 5th and 14th Amendments. Such issues, having been raised for the first time on brief, are untimely, and we decline to give them consideration. See, e.g., Krause v. Commissioner, 99T T.C. 132, 176 (1992).

6653(b). Indeed, even the tax crimes for which he was convicted were for subscribing to false tax returns under section 7206(1), which is a different crime from tax evasion under section 7201, the counterpart of section 6653(b). See Wright v. Commissioner, 84 T.C. 636 (1985) (holding that a conviction under section 7206(1), in contrast to a conviction under section 7201, does not operate as collateral estoppel).

Petitioner's emphasis on the additions to tax for fraud are considered reimbursement is misplaced. Although Ianniello v. Commissioner, supra at 183, indicates that there was some evidence of such costs in that case, the Court made it clear that proof of costs was not a necessary element of the addition to tax under section 6653(b). Similarly, we do not accept petitioner's suggestion that some significance attaches to the fact that

Congress has used the work "penalty" to describe the statutorily designated "addition to tax". Not only does the "penalty" description coincide with a semantical course of judicial and legislative expressions over many years which contain no evidence that a substantive difference from "addition to tax" was intended, but even when Congress actually so changed the designation in enacting the present section 6662, there is nothing to indicate that it had any substantive change in mind.

Under the foregoing circumstances, petitioner's attempt to distinguish Ianniello v. Commissioner, supra, from the instant case on ground that the deficiencies and additions to tax herein are much greater

is unavailing. Thus, petitioner's constitutional arguments again must fail.[6]

Finally, we consider the impact of section 6661, which imposes an addition to tax of 10 percent of the amount of any underpayment which is attributable to a substantial understatement of income tax. The amount of the understatement is reduced by the portion which is attributable to: (1) The tax treatment of any item if there is or was substantial authority for such treatment, or (2) Any item with respect to which the relevant facts affecting the item's tax treatment are adequately disclosed in return or in a statement attached to the return. Sec. 6661(b) (2) (B). Petitioner has presented no evidence

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[6] We note that it appears that, under the plea agreement, the monies, i.e., cash, forfeited by petitioner in the amount of at least $600,000.00 are to be applied to any deficiencies, including additions to tax, determined in this case.

of any such substantial authority. His contention that such authority exists in his constitutional arguments is without merit. Nor has he shown that he adequately disclosed the relevant facts affecting his treatment of such income. Indeed, he has stipulated that the amounts determined by respondent were not included in his returns for 1981 and 1982, i.e., total nondisclosure. Accordingly, respondent's determination under section 6661 is sustained.

Decision will be entered for respondent.

Supreme Court, U.S.
FILED
MAY 31 1994
OFFICE OF THE CLERK

(3)

No. 93-1540

# In the Supreme Court of the United States

OCTOBER TERM, 1993

THOMAS H. MCNICHOLS, PETITIONER

*v.*

COMMISSIONER OF INTERNAL REVENUE

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT*

## BRIEF FOR THE RESPONDENT IN OPPOSITION

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## QUESTION PRESENTED

Whether imposition of the federal income tax, interest, and additions to tax owed on illegally derived income violates the Fifth or Eighth Amendments to the United States Constitution when certain of the assets presumably derived from that income were subsequently forfeited to the United States pursuant to a plea agreement in a separate criminal proceeding.

## TABLE OF CONTENTS


| | Page |
|---|---|
| Opinions below | 1 |
| Jurisdiction | 1 |
| Statement | 2 |
| Argument | 5 |
| Conclusion | 10 |
| Appendix | 1a |


## TABLE OF AUTHORITIES

Cases:


| | |
|---|---|
| *Austin* v. *United States*, 113 S. Ct. 2801 (1993) | 4, 7, 9, 10 |
| *Commissioner* v. *Glenshaw Glass Co.*, 348 U.S. 426 (1955) | 5 |
| *Helvering* v. *Mitchell*, 303 U.S. 391 (1938) | 4, 6, 7, 9, 10 |
| *Ianniello* v. *Commissioner*, 98 T.C. 165 (1992) | 7 |
| *James* v. *United States*, 366 U.S. 213 (1961) | 5, 6 |
| *Spies* v. *United States*, 317 U.S. 492 (1943) | 7 |
| *Traficant* v. *Commissioner*, 884 F.2d 258 (6th Cir. 1989) | 7 |
| *United States* v. *Busher*, 817 F.2d 1409 (9th Cir. 1987) | 9 |
| *United States* v. *Certain Real Property and Premises Known as 38 Whalers Cove Drive*, 954 F.2d 29 (2d Cir.), cert. denied, 113 S. Ct. 55 (1992) | 9 |
| *United States* v. *Halper*, 490 U.S. 435 (1989) | 4, 7, 8, 9 |
| *United States* v. *Sarbello*, 985 F.2d 716 (3d Cir. 1993) | 9 |


Constitution and statutes:


| | |
|---|---|
| U.S. Const.: | |
| Amend. V (Double Jeopardy Clause) | 3, 4, 6, 7, 8, 9 |
| Amend. VIII (Excessive Fines Clause) | 3, 4, 6, 7, 9 |
| False Claims Act, 31 U.S.C. 3729-3731 | 8 |
| Internal Revenue Code (26 U.S.C.): | |
| 26 U.S.C. 61(a) | 5, 6 |
| 26 U.S.C. 6653(b) (1976) | 2 |

Statutes—Continued:


| | Page |
|---|---|
| 26 U.S.C. 6653(b)(1) (1982) | 3 |
| 26 U.S.C. 6653(b)(2) (1982) | 3 |
| 26 U.S.C. 6661 (1982) | 3 |
| 26 U.S.C. 7206(1) | 2 |
| 18 U.S.C. 287 | 8 |
| 18 U.S.C. 1962(c) | 2 |
| 18 U.S.C. 1962(d) | 2 |
| 18 U.S.C. 1963 | 9 |
| 18 U.S.C. 1963(a)(3) | 2 |
| 21 U.S.C. 841(a)(1) | 2 |
| 21 U.S.C. 881(a)(4) | 9 |
| 21 U.S.C. 881(a)(7) | 9 |

# In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-1540

THOMAS H. MCNICHOLS, PETITIONER

*v.*

COMMISSIONER OF INTERNAL REVENUE

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT*

## BRIEF FOR THE RESPONDENT IN OPPOSITION

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-19) is reported at 13 F.3d 432. The opinion of the Tax Court (App., *infra*, 1a-10a) is reported unofficially at RIA T.C. Memo ¶ 93,061.[1]

### JURISDICTION

The judgment of the court of appeals was entered on December 29, 1993. The petition for a writ of certiorari was filed on March 28, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1] The petition for a writ of certiorari does not include a copy of the Tax Court opinion, which is therefore set forth as an appendix to this brief.

## STATEMENT

1. During 1981 and 1982, petitioner unlawfully imported and distributed marijuana in the United States. Through these illegal activities, petitioner earned approximately $503,500 in 1981 and $906,065 in 1982 (App., *infra*, 2a). He willfully failed to report this income on his tax returns for those years (*id.* at 3a).

Petitioner was subsequently indicted for numerous crimes, including distribution of marijuana (21 U.S.C. 841(a)(1)), racketeering (18 U.S.C. 1962(c)), conspiracy to engage in racketeering (18 U.S.C. 1962(d)), and subscribing to false income tax returns for the years 1981, 1982 and 1983 (26 U.S.C. 7206(1)). Pet. App. 3. The indictment further charged that petitioner had acquired various assets that were subject to forfeiture to the United States as "property constituting, or derived from," the proceeds of his racketeering activity (18 U.S.C. 1963(a)(3)). Pursuant to a plea agreement made in June 1988, petitioner pled guilty to all charges against him. He further agreed to "forfeit all right, title and interest" that he held "in the properties described in the indictment" and "in any monies held in any foreign bank accounts * * * in his name or on his behalf" (Pet. App. 3-5).

2. In February 1988, before the plea agreement was entered, the Commissioner of Internal Revenue asserted deficiencies in income tax against petitioner with respect to his unreported income from illegal activities, in the amounts of $251,228 for 1981 and $453,025 for 1982 (Pet. App. 6; App., *infra*, 1a). The Commissioner also asserted additions to tax for 1981 under 26 U.S.C. 6653(b) (1976), for a substantial understatement of income tax liability for 1982 under

26 U.S.C. 6661 (1982), and for fraud under 26 U.S.C. 6653(b)(1) and (2) (1982). Pet. App. 6-7.

3. Petitioner sought review of the asserted deficiencies, interest, and additions to tax in the Tax Court. The parties entered into a stipulation of facts in which petitioner conceded that he had "derived taxable income and incurred costs from the importation and sale of marijuana," that he "did not report any of the taxable income received or costs incurred from the sale of marijuana * * * on his federal income tax returns for [the 1981 and 1982] taxable years," that he had "fraudulently, and with intent to evade tax omitted taxable income from his federal tax returns for the * * * taxable years 1981 and 1982" and that "[a] part of the underpayments of tax * * * for the taxable years 1981 and 1982 was due to fraud" (Pet. App. 6). Petitioner contended, however, that taxing the income he had derived from his illegal drug activities violates the Fifth and Eighth Amendments to the Constitution because, under the plea agreement for his criminal charges, he had forfeited to the government various assets that emanated from the illegal income that the government sought to tax (App., *infra*, 8a). Petitioner asserted that taxing the forfeited income, in addition to the forfeiture itself, constitutes an excessive fine (*ibid.*).

The Tax Court upheld the Commissioner's determinations (App., *infra*, 1a-10a). The court held that the Double Jeopardy Clause of the Fifth Amendment and the Excessive Fines Clause of the Eighth Amendment were not implicated in this context because "the various forfeitures to which [petitioner] has been subjected relate to conviction for crimes separate and distinct from" the actions that gave rise

to the additions to tax involved here (*id.* at 8a). The court noted that "the tax crimes for which [petitioner] was convicted were for subscribing to false tax returns under section 7206(1), which is a different crime from tax evasion" (*id.* at 9a). The court further held that the Double Jeopardy Clause and the Excessive Fines Clause do not apply to petitioner's case because the taxes, interest, and additions to tax at issue do not constitute punishment (*ibid.*).

4. The court of appeals affirmed (Pet. App. 1-19). The court rejected petitioner's contention that, under *Austin* v. *United States*, 113 S. Ct. 2801 (1993), the imposition of tax, interest and penalties violates the Excessive Fines Clause of the Constitution (Pet. App. 8-12). The court found *Austin* to be inapplicable to this case because *Austin* did not involve the imposition of civil taxes, interest and penalties upon income but instead concerned whether *forfeitures* constitute a form of punishment to which the limitations of the Excessive Fines Clause of the Eighth Amendment apply (*id.* at 10-11). The court noted that there is "an insurmountable wall of tax cases * * * holding that the government has a right to do precisely what it has done here" (*id.* at 10). The court further noted that, unlike the situation in *Austin*, petitioner had consented to the forfeiture in this case (*id.* at 10, 11).

The court of appeals also rejected petitioner's argument that, under *United States* v. *Halper*, 490 U.S. 435 (1989), the imposition of tax, interest and penalties violates the Fifth Amendment proscription against multiple punishments (Pet. App. 12-15). The court pointed out that, in *Helvering* v. *Mitchell*, 303 U.S. 391 (1938), this Court concluded that additions to

tax are not punishment but are remedial in character (Pet. App. 15), and that, in *James* v. *United States*, 366 U.S. 213 (1961), the Court held that taxpayers are liable for income tax on illegal income regardless of whether they are also liable to restore its equivalent (Pet. App. 16).

## ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. a. Under Section 61(a) of the Internal Revenue Code, gross income includes "all income from whatever source derived." 26 U.S.C. 61(a). It is well settled that "unlawful, as well as lawful, gains are comprehended within the term 'gross income.'" *James* v. *United States*, 366 U.S. 213, 218 (1961) (opinion of Warren, C.J.). The fact that illegal gains represent "income" is not altered by the fact that the criminal may at some point be required to restore the proceeds of the crime to another. See *id.* at 218-221 (opinion of Warren, C.J.). From the time that petitioner received income from illegal sources in 1981 and 1982 until he forfeited various assets that he held in 1988, petitioner unquestionably enjoyed sufficient command and control over the income to be subject to tax on it. See *Commissioner* v. *Glenshaw Glass Co.*, 348 U.S. 426, 431 (1955). This Court has refused to sanction "the injustice of relieving [criminals] of the duty of paying income taxes on the money they enrich themselves with through [crime] while honest people pay their taxes on every conceivable type of income."

*James* v. *United States*, 366 U.S. at 221 (opinion of Warren, C.J.).

b. As the Tax Court held (App., *infra*, 8a-9a), imposing such a tax does not violate the Excessive Fines Clause of the Eighth Amendment or the Double Jeopardy Clause of the Fifth Amendment. Petitioner's civil tax liability existed, of course, simply because he received "income," not because that income had been derived illegally. 26 U.S.C. 61(a). Similarly, the interest owed on petitioner's tax liability existed solely because the taxes were not paid promptly when due. And, in *Helvering* v. *Mitchell*, 303 U.S. 391 (1938), this Court held that additions to tax and civil penalties for tax fraud are not "punishment" but are compensatory and remedial charges imposed "primarily as a safeguard for the protection of the revenue and to reimburse the Government for the heavy expense of investigation and the loss resulting from the taxpayer's fraud." *Id.* at 401.[2]

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[2] In *Helvering* v. *Mitchell*, the taxpayer asserted that the assessment of an addition to tax for fraud was punishment that —because he had previously been acquitted of criminal charges of willfully attempting to evade tax—was precluded by the Double Jeopardy Clause of the Fifth Amendment. The Court rejected that contention, holding that additions to tax are not penal in character. 303 U.S. at 401. Petitioner errs in asserting that *Helvering* v. *Mitchell* is inapposite here because petitioner has "already forfeited over $1,000,000.00 to the Government to satisfy costs and delinquent tax payments" and has "served a substantial prison sentence as punishment for his crime" (Pet. 31-32). When, as here, the objective of the subsequent action is remedial rather than punitive, double jeopardy does not apply even when the prior criminal action involved the same facts that are the basis for the civil liability. See *Helvering* v. *Mitchell*, 303 U.S. at 398-399. Moreover, petitioner

The Double Jeopardy Clause prohibits only *punishing* twice. It does not preclude both penal and remedial actions with respect to the same act. See *United States* v. *Halper*, 490 U.S. 435, 446 (1989). A civil tax or addition to tax or penalty that is remedial and compensatory also cannot be an excessive fine for purposes of the Eighth Amendment, the focus of which is on punishment. See *Austin* v. *United States*, 113 S. Ct. 2801, 2806, 2812 n.14 (1993). Neither the Fifth nor Eighth Amendment thus precludes petitioner's civil liability for income tax, interest and additions to tax.[3]

2. This case does not, as petitioner suggests (Pet. 38-43), conflict with *United States* v. *Halper*, 490 U.S. 435 (1989). In *Halper*, the defendant submitted 65 false claims to Blue Cross and Blue Shield of New

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has conceded that the forfeitures in this case resulted from crimes that were "not related to tax evasion but to drug trafficking" (Pet. 32).

[3] Petitioner errs in asserting that the imposition of tax, interest and additions to tax is punishment because "it is difficult to conceive of any overriding interest of the federal government besides financial gain, or further punishment by retribution or deterrence" (Pet. 20). A tax deficiency "clearly aims not to punish [a taxpayer] but to force him to pay taxes due and owing." *Traficant* v. *Commissioner*, 884 F.2d 258, 263 (6th Cir. 1989). A taxpayer sentenced to imprisonment and fined after conviction in a criminal matter is punished for the commission of a crime, and is not thereby relieved of his obligation to pay taxes due. See *Ianniello* v. *Commissioner*, 98 T.C. 165, 179 (1992). As this Court has explained, additions to tax are provided primarily as a safeguard for the protection of the revenue and to reimburse the government for the expenses of investigation and for the loss resulting from the taxpayer's neglect or deceit. *Helvering* v. *Mitchell*, 303 U.S. at 401. See also *Spies* v. *United States*, 317 U.S. 492 (1943).

York for services allegedly rendered. As a result, Blue Cross overpaid the defendant $585 and passed the overcharges on to the government. Halper was indicted, under the criminal false claims statute (18 U.S.C. 287), convicted and sentenced to a fine and imprisonment. The government thereafter sought to impose a civil penalty against Halper under the civil penalty provisions of the False Claims Act (31 U.S.C. 3729-3731). This Court considered "whether a civil sanction, in application, may be so divorced from any remedial goal that it constitutes 'punishment' for the purposes of double jeopardy analysis" (490 U.S. at 443) and concluded that a civil penalty of $130,000 was penal in nature because it was "overwhelmingly disproportionate" to the damages caused by the offensive behavior (*id.* at 449).

The analysis applied in *Halper* is inapplicable to this case for two reasons. First, *Halper* involved the imposition of a civil sanction for the same conduct that gave rise to a prior criminal sanction; in this case, the racketeering activity that gave rise to the forfeiture of certain of petitioner's property is unrelated to the conduct for which the additions to tax were imposed. The Court expressly stated in *Halper* that the Fifth Amendment does not "preclude[] the Government from seeking the full civil penalty against a defendant who previously has not been punished for the same conduct, even if the civil sanction imposed is punitive." 490 U.S. at 450.

Second, the tax and penalties imposed on petitioner in this case are not "punitive." In *Halper*, the Court specificially endorsed the conclusion in *Helvering* v. *Mitchell* that the civil tax fraud penalty is "in fact remedial," rather than punitive, because it "provid[es]

reimbursement to the Government for investigatory and other costs of the taxpayer's fraud." 490 U.S. at 442-443. The Court emphasized that "in the civil enforcement of [such] a remedial sanction there can be no double jeopardy." *Id.* at 443, quoting *Helvering* v. *Mitchell*, 303 U.S. at 404.

3. Petitioner also errs in contending (Pet. 22-24) that the decision in this case conflicts with *Austin* v. *United States*, 113 S. Ct. 2801 (1993). In *Austin*, the issue was whether the Excessive Fines Clause of the Eighth Amendment applies to forfeitures of property under 21 U.S.C. 881(a)(4) and 881(a)(7). In *Austin*, the Court concluded that this statutory forfeiture provision was punitive in nature and was therefore subject to the limitations of the Excessive Fines Clause. 113 S. Ct. at 2812.

The court of appeals correctly held (Pet. App. 10-11) that *Austin* is inapplicable to this case because petitioner has not challenged the forfeiture of his assets. Instead, petitioner consented to that forfeiture as part of his criminal plea agreement (*id.* at 3-4).[4] Moreover, assessing a tax and additions to tax on illegally obtained income is remedial in nature, rather

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[4] Because this case does not involve a challenge to a judicially imposed forfeiture, petitioner errs in relying (Pet. 25) on *United States* v. *Certain Real Property and Premises Known as 38 Whalers Cove Drive*, 954 F.2d 29 (2d Cir.), cert. denied, 113 S. Ct. 55 (1992), which involved whether a civil forfeiture under 21 U.S.C. 881(a)(7) was punishment. Similarly, *United States* v. *Busher*, 817 F.2d 1409 (9th Cir. 1987), and *United States* v. *Sarbello*, 985 F.2d 716 (3d Cir. 1993), which involved whether forfeitures under 18 U.S.C. 1963 were so grossly disproportionate to the criminal activity involved as to violate the Fifth or Eighth Amendment, have no relevance here.

than punitive, for it is designed to recover the taxes due and to compensate the government for the costs of tax investigation and enforcement activities. *Helvering* v. *Mitchell*, 303 U.S. at 401. This is thus not a case like *Austin*, where history and practice revealed "the punitive nature" of the challenged forfeiture provision. 113 S. Ct. at 2811.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1994

**APPENDIX**

T.C. Memo. 1993-61

UNITED STATES TAX COURT

THOMAS H. MCNICHOLS, PETITIONER *v.*
COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Docket No. 10412-88. Filed February 23, 1993.

*Philip M. Giordano* and *Arnold N. Pollinger*, for petitioner.
*Maureen T. O'Brien* and *Louise R. Forbes*, for respondent.

MEMORANDUM OPINION

TANNENWALD, *Judge*: Respondent determined deficiencies in, and addition to, petitioner's Federal income taxes for 1981 and 1982 as follows:

| | | Additions to Tax | | | |
|---|---|---|---|---|---|
| Year | Deficiency | Sec. 6653(b) | | | |
| 1981 | $251,228 | $125,614 | | | |
| Year | Deficiency | Sec. 6653(b)(1) | Sec. 6653(b)(2) | Sec. 6661 | |
| 1982 | $453,025 | $226,513 | 50% of the interest due on the deficiency | $113,256 | |

The issues for decision are whether petitioner: (1) Had unreported taxable income for 1981 and 1982 in the amounts of $503,500 and $906,065 respectively; (2) is liable for the additions to tax for fraud under section 6653(b)[1] ; and (3) is liable for the addition to tax under section 6661 for the taxable year 1982.

This case was submitted fully stipulated pursuant to Rule 122(a). All the stipulated facts are found accordingly. The attached exhibits are incorporated by reference.

Petitioner resided in Boston, Massachusetts, at the time the petition in this case was filed. He filed Federal income tax returns for 1981 and 1982 on the cash basis with the Internal Revenue Service Center, Andover, Massachusetts.

Petitioner was engaged in the importation and sale of marijuana during 1981 and 1982. In connection with such activities, on or about May 25, 1981, petitioner purchased an offshore shell company by the name of Travistock Trading Co., Ltd. (Travistock). A second offshore shell company, Tyler Holding, Ltd. (Tyler), was purchased on or about October 9, 1981. Travistock and Tyler were utilized by petitioner to conceal assets and revenues related to petitioner's illegal drug activities from the knowledge of the U.S. authorities, including the Internal Revenue Service.

During 1981 and 1982, petitioner deposited, or caused to be deposited, the following amounts of money into bank accounts of Travistock and Tyler:

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[1] Unless otherwise indicated, all statutory references are to the Internal Revenue Code in effect for the years at issue, and all Rule references are to the Tax Court Rules of Practice and Procedure.

| Year | Travistock | Tyler | Total |
|---|---|---|---|
| 1981 | $311,000 | $192,500 | $503,500 |
| 1982 | 39,650 | 866,415 | 906,065 |

Petitioner has stipulated that such amounts constituted income from his illegal drug activities.

For the most part, Travistock and Tyler invested the money in certificates of deposit (CD's) issued by various banks. The CD's, most of which were renewed on one or more occasions, matured during 1981, 1982, and 1983. The precise manner in which such monies ultimately were expended is unclear; it appears, however, that petitioner used the majority of such funds to purchase real property for investment, including a one-third interest in 30 acres on Martha's Vineyard, a one-half interest in three parcels of property on St. Thomas, U.S. Virgin Islands, and two condominiums in Boston, Massachusetts.

Petitioner failed to report as taxable income any portion of the drug revenues deposited into bank accounts of Travistock and Tyler during the 1981 and 1982 taxable years. Likewise, petitioner failed to claim as deductions any expenses incurred in producing such income including costs of drugs sold. In this connection, petitioner did not maintain accurate books or records in respect of his drug-related activities during the taxable years at issue.

In October 1988, petitioner pleaded guilty to a variety of criminal charges relating to the distribution of marijuana, racketeering, criminal enterprise, conspiracy to defraud the United States, and subscribing to false tax returns. As a result, petitioner was sentenced to 10 years' imprisonment and is now serving that sentence. Pursuant to a plea agreement entered into between petitioner and the U.S. Attorney for the District of Massachusetts in a related criminal case,

petitioner also forfeited substantial amounts of money and properties.

Initially, petitioner contends that the burden of proof is on respondent to establish that petitioner's unreported income, namely, the deposits into Travistock and Tyler during 1981 and 1982, was net of deductible expenses, including costs of the drugs sold. According to petitioner, "Respondent in its answer, * * * for the first time, * * * implies that Petitioner had no expenses paid from Travistock and Tyler, and that such stipulated deposits to the Petitioner were net of expenses from Travistock and Tyler." Petitioner therefore claims that respondent raised a new matter with respect to which respondent bears the burden of proof. We disagree.

In the answer, respondent simply denied error in not determining itemized deductions, credits, or offsets against the unreported income of petitioner for 1981 and 1982, as the petition alleged. Respondent's position in no way establishes a new matter which would shift the burden of proof to respondent under Rule 142(a) with respect to whether the amounts determined as income were net of expenses, insofar as the underlying deficiencies are concerned. That burden requires petitioner to show that the amounts determined for income in the notice of deficiency were not includable in income (petitioner has conceded that they were) or that they were offset by allowable deductions. *Welch v. Helvering*, 290 U.S. 111 (1933); *Flint v. Commissioner*, T.C. Memo. 1991-405 (costs of goods sold). Petitioner's attempt to transform his deductions, credits, or offsets in his "new matter" argument into a further position that respondent has the burden of proving that the determinations of income in the notice of deficiency were not arbitrary and capricious is equally without merit.

Recognizing that "the burden of proof may fall on petitioner", petitioner alternatively contends that he has met his burden of proof in respect of the deductibility of various expenditures by Travistock and Tyler in 1981 and 1982 totaling approximately $7,200. According to petitioner, such expenditures were incurred, and paid, in the ordinary course of his drug business and, as such, are deductible under section 162. Petitioner therefore asserts that the failure to allow these expenditures is a further ground for concluding that respondent's deficiency determinations were arbitrary and capricious. Again, we disagree.

There is no indication that such expenditures were related to petitioner's importation and/or sale of marijuana; rather the record indicates that they apparently were incurred for purposes of concealing revenues generated from petitioner's drug business and investing such revenues in CD's. In essence, such expenditures were at best expenses of Travistock and Tyler. As such there is no basis for allowing them as deductions to petitioner. Travistock and Tyler were created as separate entities by petitioner, and their separateness has not been disputed by respondent.[2] The record herein is utterly devoid of any evidence which would permit us to accept petitioner's argument that Travistock and Tyler were his alter egos and therefore fall within the narrow exception to the doctrine established by *Moline Properties v. Commissioner*, 319 U.S. 436 (1943). See *First Chicago Corp. v. Commissioner*, 96 T.C. 421, 444 et seq. (1991). In this connection, we not that the fact that the instant case is fully stipulated

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[2] We note that the deficiency notice does not include any interest from CD's in petitioner's income.

does not lessen either party's burden of proof. *Borchers v. Commissioner*, 95 T.C. 82, 91 (1990), affd. 943 F.2d 22 (8th Cir. 1991).

With respect to the additions to tax for fraud under section 6653(b),[3] we must determine whether respondent's burden of proof has been satisfied. That burden requires respondent to establish that there has been an underpayment, that some part of the underpayment was due to fraud (section 6653(b) and 6653(b)(1)), and the portion of the underpayment due to fraud (section 6653(b)(2)). See *DiLeo v. Commissioner*, 96 T.C. 858, 873 (1991), affd. 959 F.2d 16 (2d Cir. 1992).

With respect to the 50-percent addition to tax, the answer is clearly in the affirmative since petitioner has stipulated: (a) He failed to report income in the amounts set forth in the notice of deficiency; (b) he "fraudulently, and with intent to evade tax omitted taxable income from his federal income tax returns for the taxable years 1981 and 1982", and (c) "a part of the underpayment of tax which was required to be

[3] For the 1981 taxable year, sec. 6653(b) provided in part:

> (b) Fraud.—If any part of any underpayment (as defined in subsection (c)) of tax required to be shown on a return is due to fraud, there shall be added to the tax an amount equal to 50 percent of the underpayment. * * *

For the 1982 taxable year, sec. 6653(b) became sec. 6653(b)(1) and (2), with sec. 6653(b)(1) retaining language identical to that of prior sec. 6653(b). New sec. 6653(b)(2) provided in part:

> (2) Additional amount for portion attributable to fraud.—There shall be added to the tax (in addition to the amount determined under paragraph (1)) an amount equal to 50 percent of the interest payable under section 6601—
>
> (A) with respect to the portion of the underpayment described in paragraph (1) which is attributable to fraud, * * *



shown on petitioner's federal income tax returns for the taxable years 1981 and 1982 was due to fraud". Under these circumstances, we need not, for the purposes of the 50-percent addition to tax, examine the question of respondent's burden of proof in respect of the existence of deductions, credits, etc. Cf. *United States v. Bender*, 218 F.2d 869, 871-872 (7th Cir. 1955); *Rivera v. Commissioner*, T.C. Memo. 1979-343, and cases cited therein. Accordingly, such addition to tax attaches to the entire deficiency.

With respect to the addition to tax imposed by section 6653(b)(2), the question is the extent of respondent's burden of proof as to "the portion of the underpayment * * * which is attributable to fraud" when, as is the case herein, the taxpayer claims that there are offsetting deductions. In the cases dealing with the obligation of respondent to negate such deductions and credits in respect of the addition to tax under section 6653(b)(1), it is clear that if respondent establishes that the taxpayer had unreported income, such addition to tax attaches to the amount of such income unless the taxpayer comes forward with evidence as to the claimed deductions, in which event the burden of proof to disprove such deductions rests with respondent. Compare *United States v. Bender*, *supra*, and the cases cited in *Rivera v. Commissioner*, *supra* (there was no such evidence), with *Richardson v. Commissioner*, 264 F.2d 400, 404-405 (4th Cir. 1959), modifying T.C. Memo. 1957-122, and *Perez v. Commissioner*, T.C. Memo. 1974-211 (there was some evidence). We think the reasoning which underpins this position, namely the difficulty of the Government to show a negative, also applies to the addition to tax under section 6653(b)(2). Given petitioner's stipulation that he had income from illegal drug activities in the amounts set forth in the

deficiency notice, that he had unreported taxable income and that a part of the underpayments was due to fraud, coupled with his failure to offer any evidence of deductions (including cost of goods sold) to which he may have been entitled, we think that, under the principles enunciated in *United States v. Bender*, *supra*,[4] respondent's burden of proof has been satisfied. Accordingly, we hold that the addition to tax under section 6653(b)(2) applies to the entire underpayment as determined in the notice of deficiency.

We now turn to petitioner's contention that the imposition of the deficiencies and additions to tax, including the additions to tax for fraud, in respect of income which has been forfeited to the Government, constitutes double jeopardy under the Fifth Amendment and an excessive fine under the Eighth Amendment.[5] We considered petitioner's constitutional arguments in *McNichols v. Commissioner*, T.C. Memo. 1992-120, and concluded that the instant case was controlled by *Ianniello v. Commissioner*, 98 T.C. 165 (1992), wherein this Court held that such imposition of taxes, and additions to taxes, did not violate the taxpayers' constitutional rights.

Petitioner fails to recognize that the various forfeitures to which he has been subjected relate to conviction for crimes separate and distinct from the charge of fraudulent tax evasion under section

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[4] See also *Fifer v. Commissioner*, T.C. Memo. 1993-44.

[5] Petitioner also contends for the first time in his opening brief that the imposition of taxes and additions to taxes on income forfeited to the Federal Government violates the Due Process and Equal Protection Clauses of the 5th and 14th Amendments. Such issues, having been raised for the first time on brief, are untimely, and we decline to give them consideration. See, e.g., *Krause v. Commissioner*, 99 T.C. 132, 176 (1992).

6653(b). Indeed, even the tax crimes for which he was convicted were for subscribing to false tax returns under section 7206(1), which is a different crime from tax evasion under section 7201, the counterpart of section 6653(b). See *Wright v. Commissioner*, 84 T.C. 636 (1985) (holding that a conviction under section 7206(1), in contrast to a conviction under section 7201, does not operate as collateral estoppel).

Petitioner's emphasis on the absence of proof by respondent of the costs for which the additions to tax for fraud are considered reimbursement is misplaced. Although *Ianniello v. Commissioner*, *supra* at 183, indicates that there was some evidence of such costs in that case, the Court made it clear that proof of costs was not a necessary element of the addition to tax under section 6653(b). Similarly, we do not accept petitioner's suggestion that some significance attaches to the fact that Congress has used the word "penalty" to describe the statutorily designated "addition to tax". Not only does the "penalty" description coincide with a semantical course of judicial and legislative expressions over many years which contain no evidence that a substantive difference from "addition to tax" was intended, but even when Congress actually so changed the designation in enacting the present section 6662, there is nothing to indicate that it had any substantive change in mind.

Under the foregoing circumstances, petitioner's attempt to distinguish *Ianniello v. Commissioner*, *supra*, from the instant case on grounds that the deficiencies and additions to tax herein are much greater is unavailing. Thus, petitioner's constitutional arguments again must fail.[6]

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[6] We note that it appears that, under the plea agreement, the monies, i.e., cash, forfeited by petitioner in the amount of

Finally, we consider the impact of section 6661, which imposes an addition to tax of 10 percent of the amount of any underpayment which is attributable to a substantial understatement of income tax. The amount of the understatement is reduced by the portion which is attributable to: (1) The tax treatment of any item if there is or was substantial authority for such treatment, or (2) any item with respect to which the relevant facts affecting the item's tax treatment are adequately disclosed in the return or in a statement attached to the return. Sec. 6661(b)(2)(B). Petitioner has presented no evidence of any such substantial authority. His contention that such authority exists in his constitutional arguments is without merit. Nor has he shown that he adequately disclosed the relevant facts affecting his treatment of such income. Indeed, he has stipulated that the amounts determined by respondent were not included in his returns for 1981 and 1982, i.e., *total nondisclosure*. Accordingly, respondent's determination under section 6661 is sustained.

*Decision will be entered for respondent.*

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at least $600,000 are to be applied to any deficiencies, including additions to tax, determined in this case.

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